

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM RICHARD FERGANCHICK,
ROBERT CLARK FERGANCHICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

This is an appeal from a judgment of conviction on a one-count indictment which was returned by the Federal Grand Jury for the Southern District of California on February 26, 1964 [C. T. 2-3]. ^{1/}

The indictment charges each appellant with the robbery of the Pioneer National Bank on January 15, 1964, and in committing the offense placing lives in jeopardy by the use of two guns,

^{1/} C. T. refers to Clerk's Transcript.

dangerous weapons, and devices.

On April 14, 1964, appellants filed a motion to suppress evidence, and on May 4, 1964, a hearing was held. At the hearing appellants conceded that the arrest was lawful and supported by probable cause but raised the issue that two searches were not incident to the arrest [C. T. 6; R. T. 25, 34 of Vol. II]. ^{2/} The motion was denied [Vol. II, R. T. 66].

On November 13, 1964, trial by jury was commenced, the Honorable William J. Lindberg, District Court Judge presiding. And on November 17, 1964, the jury returned a verdict of guilty as charged [C. T. 32-35].

On February 24, 1965, each appellant was sentenced to imprisonment for a period of twenty-five years pursuant to Section 4208(a)(2) of Title 18, United States Code; each sentence to run concurrently with sentences each of the appellants was serving for the State [C. T. 46].

On March 8, 1965, each appellant filed a notice of appeal [C. T. 149].

The jurisdiction of the District Court is predicated on Title 18, United States Code, Sections 2113(a) and (d). And this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

^{2/} R. T. refers to Reporter's Transcript.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a) and (d) provides in pertinent part:

"(a) Whoever by force and violence or by intimidation, takes, or attempts to take, from the person or presence of another any property or any other thing of value belonging to, or in the care, custody, control, management or possession of any bank or any savings and loan association. . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (d) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than 25 years, or both. "

III

STATEMENT OF FACTS

On January 15, 1964, Pioneer National Bank was a national bank, member of the Federal Reserve System, and a bank whose deposits were insured by the Federal Deposit Insurance Corporation [R. T. 70].

At approximately 1:00 P. M. on that date employees Ronald

Hunt, Jeanne Liebig, Mary Louise Thielemann and customer Wendell Schaefer were present in the bank [R. T. 82]. Appellants entered the bank and utilizing the ruse of a loan application they were directed to Ronald W. Hunt, bank cashier. Robert Ferganchick sat in a chair at Mr. Hunt's desk and introduced himself as Alexander Kirkaby [R. T. 83-84]. At about this time, each appellant drew a revolver and announced, "Everyone is to do as they are told and not to worry".

Appellants ordered the bank personnel and customer into a rear supply room. Teller Mary Louise Thielemann became hysterical with fright and cashier Ronald Hunt had to assist her to the rear room [R. T. 86, 139]. In the supply room appellants ordered the men to lie face down on the floor and then bound their hands and feet with twine [R. T. 88, 145]. Thereafter appellants proceeded to rob the bank of \$14,818.38 [R. T. 91].

At the trial Jeanne Liebig identified Robert Ferganchick as the gentleman who had inquired about a loan and the three other witnesses identified both appellants as the two men who robbed the Pioneer National Bank on January 15, 1964 [R. T. 84, 86, 141, 166, 177]. The witnesses testified that each appellant carried what appeared to be revolvers and Mr. Hunt and Mr. Schaefer, who were more knowledgeable on the subject, stated that appellants used .32 or .38 caliber revolvers during the bank robbery [R. T. 97-100, 142-143]. When appellants were arrested on February 19, 1964, each man was armed with two loaded guns [Exhibits 4-7; R. T. 263-276]. Exhibit 4 was Robert Ferganchick's .38 caliber

revolver [R. T. 147, 263-265]. Exhibit 6 was William Ferganchick's .32 caliber revolver [R. T. 147, 265-276].

A latent fingerprint expert testified that at approximately 2:15 P. M. on January 15, 1964 he examined the premises at Pioneer National Bank and discovered the palm print of Robert Ferganchick on the left arm of the chair in front of Mr. Hunt's desk [R. T. 240, 253].

A special agent of the Federal Bureau of Investigation testified to his post-arrest interview of appellants wherein Robert Ferganchick in the presence of William Ferganchick admitted that they were the two men with guns who robbed the Pioneer National Bank of in excess of thirteen thousand dollars on January 15, 1964 [R. T. 300-301]. Additionally, appellants admitted that part of the eighteen hundred dollars taken from their person at the time of arrest was bank robbery proceeds [R. T. 302].

IV

ARGUMENT

- A. THE ARREST WAS VALID (1) AS SUPPORTED BY A WARRANT KNOWN OF BY THE ARRESTING OFFICER, (2) AS A LAWFUL ARREST WITHOUT A WARRANT, AND (3) AS A LAWFUL ARREST WITHOUT A WARRANT FOR THE ASSAULT UPON THE ARRESTING OFFICER.
-

On February 19, 1964 William Reese, a policeman for the City of South Pasadena, unexpectedly observed appellants at the

Santa Anita Race Track and arrested them. William Ferganchick resisted and assaulted Officer Reese during the course of the arrest [R. T. 261-263].

Pursuant to this arrest, four loaded guns and \$1, 800 were removed from appellants' persons [R. T. 263-267, 272-273]. The guns were admitted into evidence [Exhibits 4-7; R. T. 272], and testimony was offered to the effect that part of the money was proceeds of the January 15, 1964 robbery of the Pioneer National Bank [R. T. 302]. Appellants claim the arrests were illegal and therefore the aforescribed evidence was inadmissible.

Following the armed robbery of Beneficial Finance in South Pasadena, the police department had obtained a felony warrant for appellants. Officer Reese had not personally obtained the arrest warrant but the fact that he knew of the South Pasadena felony warrant's existence was one of the main reasons that Officer Reese arrested the appellants on February 19, 1964 [R. T. 218, 226-227]. And prior to trial of the instant case, appellants plead guilty to the offense described in that warrant [R. T. 221-222].

Officer Reese testified to his additional reasons for making the arrest. In January, 1964, he first saw a special bulletin issued by the Sheriff's Department. A copy of this bulletin was posted on the board at the South Pasadena Police Department and Officer Reese carried a copy of the bulletin in his patrol car [Exhibit 19; R. T. 218-219]. The Sheriff's Bulletin dealt solely with the Ferganchick brothers and stated that appellants were wanted for twenty-four robberies in the Southern California area. The Sheriff's

bulletin listed the robberies, described appellants' physical appearance and appellants' modus operandi [Ex. 19]. Furthermore, the South Pasadena Police Department had also placed police photographs or "mug shots" of appellants in each police vehicle and on the department bulletin board. Officer Reese received the photographs in November, 1963 [R. T. 220]. And, finally, Officer Reese had learned through his police department that robbery victims had identified appellants [R. T. 223-224].

Appellee submits that whether this arrest is viewed as an arrest pursuant to a warrant, or as an arrest without a warrant but supported by probable cause, the foregoing facts clearly demonstrate a lawful arrest.

Appellant has not brought the warrant or the complaint before this Court by designating it on appeal, nor is it set forth in his brief. However, even assuming arguendo that there was something defective in the warrant, the instant arrest would still be valid as a lawful arrest without a warrant.

The validity of an arrest without a warrant is to be determined by the law of the state in which the arrest was made. Miller v. United States (1958), 357 U. S. 301, 2 L. Ed. 2d 1332, 78 S. Ct. 1190; United States v. Di Re (1948), 332 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 210. Under California law, an arrest without a warrant is justified if the arresting officer has probable cause to believe that the person arrested has committed a felony. People v. Coleman (1965), 45 Cal. Rptr. 542, 235 Cal. App. 2d 612; California Penal Code, Section 836.



Thus, even an arrest made under the authority of a defective complaint or warrant is valid, if probable cause existed to make a lawful arrest, independent of the defective complaint or warrant. People v. Tillman (1965), 47 Cal. Rptr. 614. This is true under federal law, as well as California State law. Go-Bart v. United States (1930), 282 U. S. 344, 356, 51 S. Ct. 153, 75 L. Ed. 374. And see also: United States v. White, 342 F.2d 379 (4 Cir. 1965) where the Court said, at page 381:

"While the district court did not find it necessary to pass upon the validity of the arrest warrant, we think that document was clearly invalid because the complaint on which it was issued contained only unsupported hearsay, without an allegation that the officers had reason to believe that their informer was trustworthy. Nevertheless, the fact that the authorities apparently relied upon an invalid arrest warrant would not invalidate the arrest and the search and seizures which took place as incidents thereof if the officers had adequate knowledge independent of the warrant to constitute probable cause (citations). "

Probable cause for arrest without a warrant is not limited to evidence that would be admissible at trial on the issue of guilt; the test is whether the facts as they appeared to the officers at the time of the arrest were such that a reasonable man would conclude that the arrested person should be held to answer. People v.

Murphy, 173 Cal. App. 2d 367, 377, 343 P. 2d 273 (1959).

The Government submits that the facts, known to Officer Reese at the time of the arrest, were such as would lead a reasonable man to conclude that the appellants should be taken into custody.

People v. Luckman (1961), 198 Cal. App. 2d 347, 18 Cal. Rptr. 167.

However, even assuming, for the sake of argument, that the warrant was defective and that there was no probable cause to arrest appellant for armed robbery without a warrant, Officer Reese still had probable cause to arrest for the assault with intent to commit murder. The assault was perpetuated by appellant upon the person of Officer Reese at the time of the arrest for armed robbery, and appellant was subsequently booked on the assault charge [R. T. Vol. II, p. 20].

In conclusion, the Government submits that the arrest must be upheld for the following reasons:

1) That the arrest was supported by the existence of a warrant which was within the knowledge of the arresting officer - a warrant describing an offense to which appellants subsequently plead guilty - and which warrant is not now before this Court for examination into any alleged defect.

2) That the arrest was supported by probable cause, independent of any alleged defect in the warrant on the complaint.

3) That the arrest was valid as an arrest without a warrant for the assault with intent to commit murder upon Officer Reese (which was the first offense appellant was booked under).

B. THE CONFESSION OF ROBERT FERGANCHICK WAS NOT ILLEGALLY OBTAINED.

Shortly after 3:00 P. M. on February 19, 1964, appellants were arrested at the Santa Anita Race Track [R. T. 258]. During the arrest William Ferganchick assaulted Officer Reese [R. T. 261-263]. Appellants were then transported to Arcadia Police Department, which had jurisdiction over the place of arrest, where they were booked on a charge of assault with intent to commit murder [R. T. Vol. II, p. 20]. After completion they were transported to the South Pasadena Police Department, arriving shortly after 5:00 P. M. [R. T. 273-274]. At approximately 6:30 P. M., appellants completed the booking procedure at South Pasadena Police Department [R. T. 274].

Since appellants had initially been arrested after 3:00 P. M., they could not be arraigned until 2:00 P. M. the following day, which was the time established by the Pasadena courts for arraignment [R. T. 275].

Between 6:30 P. M. and 8:30 P. M., appellants were questioned.

At 8:00 P. M. a special agent of the Federal Bureau of Investigation arrived at the police department. A Federal complaint for the robbery of Pioneer National Bank had been issued [R. T. 206].

At 8:30 P. M. the Special Agent was invited to join the interview of Robert Ferganchick [R. T. 296]. The Special Agent

identified himself and displayed his credentials. He advised Robert Ferganchick that he need not make any statements; no threats or promises were being made in order to induce a statement; any statement could be used against him in a court of law; and, that he had a right to consult an attorney before making any statement [R. T. 297].

Robert Ferganchick still refused to answer any questions and at 9:00 P. M. he said he wanted to talk to his brother, which he was allowed to do, and there was a break in the interview until 10:00 P. M. At 10:00 P. M., appellants were present and the Special Agent repeated the aforescribed constitutional warning to both [R. T. 298-299]. Thereafter, Robert Ferganchick in the presence of William Ferganchick admitted they were the armed men who robbed the Pioneer National Bank on January 15, 1964 [R. T. 300-301].

Appellants contend the testimony regarding the confession was admitted in violation of Mallory v. United States, 354 U.S. 449.

Appellants had on separate occasions been interviewed between 6:30 P. M. and 9:00 P. M. It is to be noted that one police captain directed the questioning. Thus, each appellant was not questioned for the entire two and one half hours [R. T. 282].

When appellants confessed to the FBI agent at 10:00 P. M., they were in the custody of the Pasadena Police Department for armed robbery of the Beneficial Finance Company. That this was a valid State Custody is indicated by the fact that the Federal warrant was returned unexecuted and the instant case was initiated by

indictment [R. T. 206]. In addition, appellant entered a plea of guilty to said robbery of the Beneficial Finance Company prior to the trial in the instant case [R. T. 221-222].

Because during the period of detention questioned here, appellants were in state, not federal, custody, Rule 5(a) of the Federal Rules of Criminal Procedure has no applicability.

As the United States Court of Appeals for the Fourth Circuit stated in Carpenter v. United States (1959), 264 F.2d 565, 571:

"Federal rules and statutes governing the arraignment of persons in federal custody have no application, however, to the arraignment by state officials of state prisoners, unless, of course, the state officials are acting for, and under the direction of, federal agents under circumstances which fairly warrant the conclusion that the custody is federal in substance (citations)."

And, in this regard, the Court went on to point out that:

"The arresting officer was executing no federal warrant. As soon as he identified Carpenter, he arrested him, not because of any command of the FBI, but because he was believed to be a dangerous felon wanted for prosecution in other jurisdictions. The officer was neither under the control nor the direction of the FBI, and his custody was that of the state, which could not be converted into federal custody merely by reason of the prior receipt of the

widely broadcast FBI flier." (at page 572).

In the instant case the "flier" was put out by the Los Angeles County Sheriff's office, not the FBI [Exhibit 19].

Appellee will assume, therefore, that the question of whether the confession was obtained during a period of unlawful detention must be governed by California state law.

The transcript shows that the subjects were arrested at 3:00 P. M. on February 19, 1964, and that a magistrate would not again be available for arraignment until 2:00 P. M. the following day [R. T. 275]. California Penal Code, Section 825 provides that the defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays. Since there is no indication in the record that appellant was not arraigned in accordance with these California procedures, it cannot now be urged on appeal that the confession was taken during a period of illegal detention.

People v. Twiggs, 223 Cal. App. 2d 455,

35 Cal.Rptr. 859 (1963).

Appellant appears to contend, further, that the confession should have been excluded because of failure of intelligent waiver in regard to the right to counsel and the right to remain silent. In support of this, appellant cites the readily distinguishable case of Westover v. United States, 374 U.S. 436, 494-497 (decided June 13, 1966).

First, it should be noted that Westover, which is one of the



companion cases to Miranda v. Arizona, 384 U.S. 436 (1966), has no application in this appeal, since trial took place November 13, through 17, 1964. Johnson v. New Jersey, 384 U.S. 719 (1966).

Furthermore, Westover involved overnight questioning of some 14 hours at the hands of local police before three FBI agents arrived on the scene and continued the questioning for an additional two and one-half hours.

In the instant case, on the other hand, appellant Robert Ferganchick was questioned only from 6:30 P. M. until 8:30 P. M. before the FBI intervened with a full and complete warning under Escobedo [R. T. 297]. When, at 9:00 P. M., appellant Robert Ferganchick requested to see his brother William, he was immediately allowed to do so. And the brothers held a personal conversation until 10:00 P. M., at which time the brothers were again warned of their constitutional rights before being allowed to confess [R. T. 298-299]. The Government submits that the facts in this case clearly demonstrate an intelligent waiver of appellants' constitutional rights.

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jo Ann I. Dunne
JO ANN I. DUNNE

